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No. 15

Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES, PETITIONER

v.

CROWELL MANUFACTURING COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	5
Summary of argument	6
Argument:	
The contract does not provide for reimbursement of the processing taxes here sought	7
Conclusion	10

CITATIONS

Cases:	
Batavia Mills, Inc. v. *United States*, 85 C. Cls. 447	8
Cramp & Sons Ship Co. v. *United States*, 72 C. Cls. 146	10
Fuhrman & Forster Co. v. *Commissioner* (C. C. A. 7th), decided July 22, 1940	9
Jaeger, Oswald, Baking Co. v. *Commissioner*, 108 F. (2d) 375, certiorari denied, 309 U. S. 683	9
Lash's Products Co. v. *United States*, 278 U. S. 175	9
Liggett & Myers Co. v. *United States*, 299 U. S. 383	9
New Consumers Bread Co. v. *Commissioner* (C. C. A. 3d), decided Oct. 4, 1940	9
United States v. *Glenn L. Martin Co.*, 308 U. S. 62	8
Wheeler Lumber Co. v. *United States*, 281 U. S. 572	9
Zinsmaster Baking Co. v. *Commissioner*, 109 F. (2d) 738	9
Statutes:	
Agricultural Adjustment Act, c. 25, 48 Stat. 31, Sec. 9	2
Miscellaneous:	
Williston, *Contracts* (Rev. ed., 1936), 1786 ff	10

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 188

THE UNITED STATES, PETITIONER

v.

COWDEN MANUFACTURING COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 5) is reported in 32 F. Supp. 141.

JURISDICTION

The judgment of the Court of Claims was entered on April 1, 1940 (R. 11). The petition for a writ of certiorari was filed June 27, 1940 (R. 12), and was granted October 14, 1940. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Respondent contracted to sell to the United States a specified number of mechanics' suits at a stated price. The contract provided for the addition to the purchase price of any after-imposed federal taxes which might be "made applicable directly upon the * * * manufacture * * * of the supplies covered by this contract" and which "are paid by the contractor on the articles or supplies herein contracted for".

In purchasing cloth and thread to be used in manufacturing the suits, respondent was compelled to reimburse its vendors for processing taxes paid by them in producing these materials. Is respondent entitled to add such extra costs to the contract price in its sales of the suits to the United States?

STATUTE INVOLVED

The pertinent provisions of the Agricultural Adjustment Act, c. 25, 48 Stat. 31, are as follows:

PROCESSING TAX

> SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to

such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). * * * .

* * * * *

(d) As used in part 2 of this title—

* * * * *

(2) In case of cotton, the term "processing" means the spinning, manufacturing, or other processing (except ginning) of cotton; * * * .

STATEMENT

The special findings of fact of the Court of Claims may be summarized as follows:

Respondent, a Missouri corporation, entered into a contract with the United States through the proper purchasing officer of the Quartermaster Corps at Philadelphia, Pennsylvania, on June 24, 1933, under the amended terms of which respondent agreed to sell to the United States 35,220 suits, mechanics type B–1, at $1.90 each, or a total of $66,918. The suits were delivered to and accepted by the petitioner and the sum of $66,918 was paid to the respondent. (R. 5, 6.)

The contract in question was made pursuant to a bid submitted to the War Department by the

respondent on June 6, 1933. Both the bid and the contract contained the following provision (R. 6):

> Prices set forth herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material purchased under this contract. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this contract will be increased or decreased accordingly and any amount due the contractor as a result of such change will be charged to the government and entered on vouchers (or invoices) as separate items.

Respondent purchased the cotton cloth from which it manufactured the suits in question from McCampbell and Company, 320 Broadway, New York, selling agent for Graniteville Manufacturing Company of South Carolina, under a contract providing for increasing the price of the cotton by the amount of any federal taxes imposed after the contract date and before delivery of the cloth. Pursuant to this provision McCampbell and Company billed respondent as a separate item on the invoices for the cloth in question in the amount of $4,425.54,

covering processing taxes paid by the first processor of the cloth to the Collector of Internal Revenue. (R. 6–7.)

In the manufacture of the suits respondent also used a substantial quantity of cotton thread purchased from American Thread Company under a contract containing a provision similar to that heretofore referred to, as a result of which respondent paid to American Thread Company $44.44, covering processing taxes paid by that company to the Collector of Internal Revenue on the thread in question. (R. 7.)

Respondent filed a claim against the United States with the War Department for the amount of $4,469.98, being the aggregate processing tax applicable to the cotton cloth and thread used in the manufacture of the suits. The claim was referred to the Comptroller General of the United States and was rejected by him on August 11, 1936. (R. 7–8.)

On December 1, 1938, this suit was filed in the Court of Claims, which rendered an opinion in favor of the respondent and entered judgment in the amount of $4,469.98. (R. 1, 5–11.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that respondent is entitled to reimbursement under the terms of the contract for "taxes" ultimately borne by it but paid by the

first processors of the materials used by respondent in the manufacture of the supplies covered by the contract.

2. In failing and refusing to hold that the taxes were not "made applicable directly upon the production, manufacture, or sale of the supplies" covered by the contract and were not "paid by the contractor on the articles or supplies" contracted for.

3. In failing to enter judgment for the United States and dismiss the petition.

SUMMARY OF ARGUMENT

Respondent may add to the contract price only such taxes as were "applicable directly upon the production, manufacture, or sale of the supplies" covered by the contract. The "supplies" here were mechanics suits, and no tax whatever was imposed with respect to the production, manufacture, or sale of mechanics suits. The taxes which respondent seeks to add to the contract price were imposed upon the processors of the cotton and thread purchased by respondent. Not only were these taxes *not* "applicable directly upon the * * * manufacture * * *" of the mechanics suits; they were not even imposed upon respondent. Moreover, respondent's mere reimbursement of taxes paid by another did not make it a taxpayer.

ARGUMENT

THE CONTRACT DOES NOT PROVIDE FOR REIMBURSEMENT OF THE PROCESSING TAXES HERE SOUGHT

The contract here in question provides that the specified prices are to be altered only to reflect taxes or charges (R. 6) "imposed or changed by the Congress after the date set for the opening of the bid upon which this contract is based and made applicable directly upon the production, manufacture, or sale of the supplies covered by this contract and * * * paid by the contractor on the articles or supplies herein contracted for, * * *."

The taxes for which respondent seeks to be reimbursed were not imposed upon it. They were imposed under Section 9 of the Agricultural Adjustment Act upon the processors of the cotton and thread which respondent purchased. They were not imposed with respect to respondent's manufacturing operations in converting the cotton and thread into mechanics' suits. Rather, the taxes were laid with respect to the manufacturing operations of respondent's vendors.

Under respondent's contract with the United States the taxes may be included in the contract price only if they are "applicable directly upon the production, manufacture, or sale of the supplies covered by" the contract. (R. 6.) But the "supplies" covered by the contract in this case were mechanics' suits, not cotton or thread. And no tax

of any kind, directly or indirectly, was imposed with respect to the "production, manufacture, or sale" of mechanics' suits.[1]

That respondent's mere reimbursement of taxes imposed upon and paid by its vendors does not come within the contract provision is, we submit, plain, and follows *a fortiori* from *United States* v. *Glenn L. Martin Co.*, 308 U. S. 62. That case involved a contractual provision substantially identical with the one in controversy here, and the question there was whether Social Security taxes imposed upon the contracting corporation itself could be added to the contract price. In denying the claimant's contention, this Court stressed the fact that the taxes must be "on" the article sold to the Government. (P. 65.) In the instant case, the taxes certainly were not imposed "on" the mechanics' suits. Indeed they were not even imposed

[1] The instant case is thus to be distinguished from *Batavia Mills, Inc.* v. *United States*, 85 C. Cls. 447, relied upon by respondent. There, the contractor had undertaken to sell certain supplies to the United States, and had purchased those supplies completely fabricated. The contractor reimbursed the vendor for the taxes paid with respect to the production of those supplies, and was permitted to add such taxes to the contract price. Thus, the taxes in that case were levied with respect to the very subject matter of the contract with the United States, whereas here the taxes were imposed in connection with the processing of the constituent raw materials that went to make up the final product. And, in any event, the decision reached in the *Batavia Mills* case rests upon exceedingly dubious grounds.

upon the contractor.[2] They were imposed upon the processors of the raw materials that were purchased and employed by the contractor in producing its final product for sale to the Government. And the mere reimbursement of those taxes by the contractor to its vendors does not render it a taxpayer. *Oswald Jaeger Baking Co.* v. *Commissioner,* 108 F. (2d) 375 (C. C. A. 7th), certiorari denied, 309 U. S. 683; *Zinsmaster Baking Co.* v. *Commissioner,* 109 F. (2d) 738 (C. C. A. 8th); *New Consumers Bread Co.* v. *Commissioner* (C. C. A. 3d), decided October 4, 1940; *Fuhrman & Forster Co.* v. *Commissioner* (C. C. A. 7th), decided, July 22, 1940. Cf. *Lash's Products Co.* v. *United States,* 278 U. S. 175.

That reimbursement of the character here sought was not contemplated by the parties is apparent not only from the precise use of the word "directly," but from the general character of the tax provision. While they might have contracted to do business on a cost-plus basis, or might have in-

[2] Some of the cases dealing with intergovernmental tax immunity, while not squarely in point, furnish a persuasive analogy. On the assumption that the test of immunity was whether the burden was direct or indirect, the Court in *Liggett & Myers Co.* v. *United States,* 299 U. S. 383, 386, held that a tax on the manufacture of tobacco subsequently sold to a state instrumentality did not impose any "direct burden" upon the state. And in *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572, 579, the Court held that a federal tax on the transportation of lumber sold to a county was valid since "the transportation was not part of the sale but preliminary to it and wholly the vendor's affair."

cluded an "equitable adjustment" clause as is done in many government contracts, the parties provided only for price increases to reflect taxes imposed "directly" on the manufacture of the contract articles. Cf. *Cramp & Sons Ship Co.* v. *United States*, 72 C. Cls. 146.

Not only is the construction here urged that contemplated by the parties, but it represents the only reasonable interpretation of the provisions of the contract. Any other construction introduces the difficult, and in many instances impossible, task of tracing the shifting burden of taxes to determine where it has ultimately fallen. The preference in the construction of contracts for an interpretation avoiding unreasonable or impossible results is well established. See Williston, *Contracts* (Rev. ed., 1936), 1786 ff.

CONCLUSION

The decision of the court below is erroneous and should be reversed.

Respectfully submitted.

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